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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

AHMED ADEL HIJAZI,

Defendant and Appellant.

G040644

(Super. Ct. No. 06HF2464)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Jeffrey J. Koch, Deputy Attorney General, for Plaintiff and Respondent.

Ahmed Adel Hijazi<sup>1</sup> appeals from a judgment after a jury convicted him of one count of receiving stolen property and one count of misdemeanor possession of a vessel without a hull identification number. He argues insufficient evidence supports his convictions, the trial court erroneously instructed the jury with CALCRIM No. 376, and the court erroneously refused to instruct the jury with CALCRIM No. 3406. None of his contentions have merit, and we affirm the judgment.

### FACTS

Mike Marshall reported to the Newport Beach Police Department an outboard motor, battery, and fuel tank (collectively the motor) had been stolen from a dinghy belonging to his employer, John Woodhull (count 3). Marshall provided the police with a description of various unique identifying characteristics of the motor. Marshall believed the motor had been stolen to be resold so he began checking for a motor with the same description on Craigslist and eBay.

A week or two after the theft, Marshall found an eBay advertisement for a motor matching the description of the stolen motor. He called the police and contacted the eBay seller by email inquiring if there was a serial number on the motor that was listed for sale. The seller told Marshall she did not know where to look for the serial number. The next contact with the seller was by Kirk Jacobi, a Newport Beach Police detective.

The eBay sellers were Beverly and Dennis Sam. Dennis Sam (Sam) was in the business of buying items and selling them on eBay for a profit. He located the motor on [www.Recycler.com](http://www.Recycler.com), contacted the person listed as the seller, and purchased the motor.

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<sup>1</sup> Ahmed Adel Hijazi and Salah Adel Hijazi are co-defendants and share the same last name. For the sake of clarity, we will refer to the Hijazis by their first names and intend no disrespect.

In court, he identified Salah as the person from whom he purchased the motor. Sam had no contact with Ahmed. Sam indicated he had negotiated with Salah over the price and ultimately purchased the motor for \$1,100, which was less than the asking price. Salah gave Sam a receipt showing the sales price and signed it, "Sal Hijazi." The police recovered the motor from Sam. The motor did not bear a serial number, but there was a strip of adhesive where it appeared a tag had been removed.

Later, Jacobi found another Recycler advertisement for a different outboard motor listing the same telephone number Sam had contacted to arrange the purchase of his motor. Jacobi enlisted the help of Ronald Vallercamp, a Newport Beach sergeant, who had knowledge of boat motors. Vallercamp made two telephone calls to the seller. The seller identified himself as "Sal," and arranged to meet him at a residence in Costa Mesa so Vallercamp could look at the motor, and two additional motors that were also for sale.

Soon after, Vallercamp went to the Costa Mesa residence with Detective Tom Voth, and both posed as potential buyers. Either Vallercamp or Voth was wearing a wire that allowed Jacobi and other detectives to listen in on conversations. When the undercover officers arrived, Ahmed and Salah came out to the driveway where three boat motors, a boat on a trailer, and a jet ski were located. Vallercamp negotiated a price for the three motors with Salah. Ahmed was present but was not part of the negotiations. When the officers suggested they were interested in buying additional motors, two more were produced and offered for sale. A signal was then given, and the other officers who were standing by responded and arrested Salah and Ahmed. Jacobi observed there were no serial number tags on the five motors that were on the driveway.

Jacobi also observed the boat in the driveway, a nine-foot inflatable boat with a hard hull, was missing its required hull identification number plate. Jacobi explained a hard hull was different than a rubberized hull. This hard hull was fiberglass with inflatable pontoons. Jacobi observed the hull identification number plate had been

removed from the back of the transom where the motor mounts on to it. Jacobi testified at trial that all boats are required to have hull identification numbers similar to vehicle identification numbers on cars.

Police then put an advertisement in the Daily Pilot newspaper indicating the police had recovered some outboard motors and asking any victims to come forward to identify the motors. Paul Secard contacted the police in response to the advertisement and was able to identify one of the recovered motors as a motor that was stolen from his boat the previous month (count 2). Dennis Dalessio discovered his outboard motor was missing sometime a few weeks before. He contacted the police and was able to identify one of the recovered motors as his (count 5), and later at trial identified Ahmed as someone he saw near where he docked his boat. John Cullens also contacted the police about his missing motor. It had been stolen from the stern of his boat sometime the previous summer (count 6). Cullens was able to identify one of the recovered motors as his because of a modification he had made to the motor.

An information charged Salah and Ahmed with six counts of grand theft in violation of Penal Code section 487, subdivision (a) (counts 1-6),<sup>2</sup> one count of receiving stolen property in violation of section 496, subdivision (a) (count 7), and one count of misdemeanor possession of a vessel without a hull identification in violation of Vehicle Code section 9872.1, subdivision (a) (count 8).

Over objection by both defendants, the trial court instructed the jury with CALCRIM No. 376. Salah requested the court to instruct the jury with CALCRIM No. 3406, but it refused.

The jury convicted Ahmed of one count of receiving stolen property (count 7), and one count of misdemeanor possession of a vessel without a hull identification (count 8). The trial court placed Ahmed on three years of formal probation

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<sup>2</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

with the usual terms and conditions and on condition he spend 90 days in jail, and pay restitution.

## DISCUSSION

Ahmed argues there was insufficient evidence to support his convictions on the receiving stolen property charge (count 7) and his conviction on possession of a vessel without a hull identification number (count 8). He also contends the trial court erred by instructing the jury with CALCRIM No. 376, and by refusing to instruct the jury with CALCRIM No. 3406. We will discuss each of his claims in turn.

### *Sufficiency of Evidence*

Our standard of review is well established. “In reviewing a sufficiency of evidence claim, the reviewing court’s role is a limited one. ““The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citations.] [¶]

““Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]” [Citation.]’ [Citation.]” (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).)

### *Count 7- Receiving Stolen Property*

Ahmed argues there was insufficient evidence to support his receiving stolen property conviction because there was no substantial evidence he possessed the stolen property. Possession of stolen property may be either actual or constructive, and

need not be exclusive. Possession is established if the evidence proves the defendant exercised a measure of control or dominion over the stolen property. (*People v. Land* (1994) 30 Cal.App.4th 220, 223-224.) There is ample evidence Ahmed exercised a measure of control and dominion over the stolen motors. He was the first to walk out of the house to show the motors to the officers, and was present throughout the negotiations. That Ahmed offered several times to fill up a trash can with water and start up an engine is convincing evidence he was in control of the motors.

Ahmed also contends there was insufficient evidence to establish he had knowledge the motors were stolen. “The knowledge element of receiving stolen property is normally proved not by direct evidence but by an inference from circumstantial evidence. [Citation.]” (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1019.) When possession has been established, corroboration on the issue of knowledge “‘need only be slight and may be furnished by conduct of the defendant tending to show his guilt. [Citations.]’” (*In re Richard T.* (1978) 79 Cal.App.3d 382, 388.) In other words, “‘knowing possession by a defendant of recently stolen property raises a strong inference of the other element of the crime: the defendant’s knowledge of the tainted nature of the property. This inference is so substantial that only ‘slight’ additional corroborating evidence need be adduced in order to permit a finding of guilty. [Citation.]” (*People v. Anderson* (1989) 210 Cal.App.3d 414, 421.)

Here, there was more than adequate corroborating evidence. It was not just one recently stolen motor in Ahmed’s possession, but a veritable inventory of stolen motors. And none of the motors had serial number tags. This alone is highly suggestive Ahmed knew something was amiss with respect to the motors. (See *People v. Ricketts* (1970) 7 Cal.App.3d 441, 446 [upholding conviction for receiving stolen property where defendant had stolen car seven weeks after theft but no key or registration for vehicle].) Thus, we conclude the record contains sufficient evidence to establish Ahmed both possessed the stolen motors and knew the motors were stolen.

*Count 8- Possession of a Vessel without a Hull Identification Number*

Ahmed also contends insufficient evidence supports his conviction for possession of a vessel without a hull identification number. He asserts Jacobi's lay opinion was the only evidence the nine-foot inflatable boat required a hull identification number, and this evidence was insufficient because Jacobi admitted he had no expertise in boating. Ahmed asserts the definition of vessel contained in Harbors and Navigation Code section 501, subsection (e), contradicts Jacobi's testimony "all boats" are required to have hull identification numbers.

Harbors and Navigation Code section 501, subdivision (e), states: "‘Vessel’ means every description of watercraft, other than a seaplane on the water or a floating home, used or capable of being used as a means of transportation on the water and required to be registered, excluding any vessel which has a valid marine document issued by the United States or any agency thereof."

The Attorney General cites the definition of vessel provided in Vehicle Code section 9840. Subject to exceptions not pertinent here, this section provides, "‘Vessel’ includes every description of watercraft used or capable of being used as a means of transportation on water . . . ." (Veh. Code, § 9840, subd. (a).)

Vehicle Code section 9872.1, subdivision (a), provides: "No person shall knowingly buy, sell, offer for sale, receive, or have in his or her possession any vessel, or component part thereof, from which the hull identification number has been removed, defaced, altered, or destroyed, unless the vessel or component part has attached thereto a hull identification number assigned or approved by the department in lieu of the manufacturer's number."

In addition to Jacobi's testimony as to the requirement the boat have a hull identification number, there was Jacobi's testimony as to the circumstances that suggested the boat's hull identification number plate had been removed. Lay opinion testimony is governed by Evidence Code section 800, which states: "If a witness is not

testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony.” A trial court’s decision to admit lay opinion “will not be disturbed ‘unless a clear abuse of discretion appears.’ [Citations.]” (*People v. Mixon* (1982) 129 Cal.App.3d 118, 127.)

“Boating” expertise was not necessary to allow Jacobi to testify as to the requirements of Vehicle Code section 9872.1. Jacobi’s testimony regarding the appearance of the transom area was sufficient to establish a hull identification had been present and subsequently removed.

Ahmed also argues there was insufficient evidence to establish he knowingly possessed a vessel without proper hull identification. “The elements of unlawful possession may be established by circumstantial evidence and any reasonable inferences drawn from such evidence. [Citations.]” (*People v. Newman* (1971) 5 Cal.3d 48, 52, overruled on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862.) We will not reiterate all of the circumstantial evidence that supports the inference Ahmed knowingly possessed the boat without proper hull identification. Suffice it to say, the same circumstantial evidence that established Ahmed knowingly possessed stolen property establishes the requisite knowledge as to this count.

*CALCRIM No. 376*

Ahmed argues there was insufficient evidence to support the giving of CALCRIM No. 376, and this instruction is constitutionally infirm because it allowed the jury to convict him on less than proof beyond a reasonable doubt. The Attorney General argues Ahmed has forfeited a claim of instructional error based on insufficient evidence because he failed to challenge this instruction in the trial court on



the basis of factual insufficiency. Nevertheless, we shall address the merits of his contention.

The jury was instructed with a modified version of CALCRIM No. 376 that read as follows: “If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of theft or receiving [stolen] property based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed theft or receiving stolen property. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of theft or receiving stolen property. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.”

“The trial court has a duty to instruct the jury on all principles of law relevant to the issues raised by the evidence [citation] and a correlative duty to refrain from instructing on irrelevant and confusing principles of law [citation].” (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250.) An instruction must be given only if it is supported by substantial evidence. Instructions on unsupported theories should not be given to the jury. (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) As described more fully above, substantial evidence supported the giving of this instruction.

Ahmed also contends the giving of CALCRIM No. 376 violated his constitutional rights. He argues this instruction allowed the jury to convict him of receiving stolen property on less than proof beyond a reasonable doubt. We disagree. CALCRIM No. 376 instructed the jury that possession of recently stolen property, without supporting evidence, was not sufficient alone to establish guilt. As to the

supporting evidence, the instruction advised the jury this evidence “need only be slight and need not be enough by itself to prove guilt.” The instruction clearly alerted the jury that it could “not convict the defendant of any crime unless [it was] convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.” We conclude CALCRIM No. 376 did not allow the jury to convict Ahmed on less than proof beyond a reasonable doubt. (*People v. Prieto* (2003) 30 Cal.4th 226, 248 [rejected constitutional challenge to CALCRIM No. 376’s predecessor CALJIC No. 2.15].)

*CALCRIM No. 3406*

Ahmed argues trial court erroneously refused his request to instruct the jury with CALCRIM No. 3406. Ahmed asserts he was entitled to this instruction so the jury would be aware of the requisite knowledge element of the crime of stolen property. He argues an honest mistake of fact is a defense when it negates a required mental element of the crime. The Attorney General maintains Ahmed has forfeited this claim of instructional error because he did not join in Salah’s request for the instruction. Again, we will address the merits of his contention.

A trial court has a duty to instruct on defenses where there is substantial evidence supporting the defense and the defense is not inconsistent with defendant’s theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) Substantial evidence means evidence which is sufficient to deserve consideration by the jury and which a jury comprised of reasonable persons could conclude the particular facts underlying the instruction existed. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

CALCRIM No. 3406 reads as follows: “The defendant is not guilty of \_\_\_\_\_ <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably

and] mistakenly believed a fact. [¶] If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit \_\_\_\_\_ <insert crime[s]>. [¶] If you find that the defendant believed that \_\_\_\_\_ <insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for \_\_\_\_\_ <insert crime [s]>. [¶] If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for \_\_\_\_\_ <insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes).”

Ahmed argues a mistaken belief that property has been abandoned may constitute a defense. We do not disagree. But Ahmed did not testify to that, and he does not point to substantial evidence, and we have found none, that suggests Ahmed believed the property was abandoned, or he was mistaken as to any other fact or facts. Ahmed argues that when selling the motors, Salah did not make an effort to disguise his identity. Salah's conduct could form the basis for Ahmed to form a good faith, but mistaken, belief the motors were not stolen. However, we cannot conclude evidence Salah advertised the property using his own phone number, correct name, and current residence for the purpose of accomplishing a sale is sufficient circumstantial evidence to infer Ahmed was mistaken as to the stolen nature of the property. A trial court should instruct the jury with CALCRIM No. 3406 if there is substantial evidence to support a finding a mistake of fact occurred. No such evidence exists in this record because it was insufficient to raise a reasonable doubt of Ahmed's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983 [substantial evidence means evidence of a defense which if believed would be sufficient for a reasonable jury to find a reasonable doubt as to

defendant's guilt].) The trial court properly refused to instruct the jury with CALCRIM No. 3406.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.